Supreme Court, U.S.
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No. 04-318

In The Supreme Court of the United States

SAMUEL T. POOLE,

Petitioner,

v.

FAMILY COURT OF NEW CASTLE COUNTY, LORETTA M. YOUNG, EMMA HAYES, FLORENCE F. WRIGHT, JOHN W. NAILS, EDWARD J. ZETUSKY, JR., WALTER T. REDAVID, DELAWARE COUNTY BAR ASSOCIATION, and JOHN DOE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION

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STATEMENT OF QUESTION PRESENTED

Should Federal Rule of Appellate Procedure 4(a)(6) be applied consistently with Federal Rule of Appellate Procedure 4(a)(5), which requires a motion to be filed to obtain relief from an untimely appeal.

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BRIEF IN OPPOSITION

This is John W. Nails' response in opposition to Mr. Poole's Petition for Writ of Certiorari to review the decision of the United States Court of Appeals for the Third Circuit in *Poole* v. *Family Court of New Castle County, et al.*, 368 F.3d 263 (3d Cir. 2004).

FEDERAL RULE OF APPELLATE PROCEDURE AT ISSUE

The central issue in this case concerns the application of Rule 4(a) of the Federal Rules of Appellate Procedure, which is reproduced in Mr. Poole's Appendix (herein after "App."), pages 29a-32a.

PRELIMINARY STATEMENT

Mr. Poole attempts to paint this case as a picture of injustice cast upon *pro se* prisoners. However, the fact that Mr. Poole is a *pro se* inmate, has no bearing on the heart of the matter. Mr. Poole finds himself in the position he is in purely out of his own making. When Mr. Poole was moved from a prison facility in Delaware to a prison in Pennsylvania, he did not advise the court of his change of address. Had he done so, he would have timely received notice of the District Court's decision dismissing his action and he could have timely appealed. Instead, after the clerk tracked down his new address, he received notice of the decision after the 30 day appeal period. Rather than filing a motion to reopen the time to file an appeal, as required by the rule, Mr. Poole simply filed a notice of appeal. The Third Circuit held that the rule requires the filing of a

motion and that his bare notice of appeal was not sufficient. Accordingly, in a well reasoned opinion, the Third Circuit properly dismissed his appeal as being untimely. Mr. Poole, still trying desperately to keep his case alive, has filed a Petition for Writ of Certiorari. For the reasons set forth below, the petition should be denied.

STATEMENT OF THE CASE

Background Facts

At the time Mr. Poole filed his "Petition for Writ of Habeas Corpus" (hereinafter "Petition") in the United States District Court for the District of Delaware, he was a *pro se* litigant incarcerated in the Delaware Correctional Institute in Smyrna, Delaware. *Poole*, 368 F.3d at 265. The District Court construed Mr. Poole's filing as an action under 42 U.S.C. § 1983. The District Court dismissed the action *sua sponte* on grounds of lack of personal jurisdiction and frivolousness pursuant to 28 U.S.C. §§ 1915(e)(2)(B)-1915A(b)(1). *Id.* at 264. The District Court entered the order dismissing the case on March 26, 2002 and mailed the decision to all parties, including Mr. Poole at the Delaware facility. *Id.* at 264-265.

In late March, 2002, Mr. Poole was transferred from Delaware to a Pennsylvania State Correctional Institution in Graterford. *Poole*, 368 F.3d at 265. He wrote a letter to the District Court, which was received on March 22, 2002. *Id.* That letter, which bore Mr. Poole's address at the Delaware facility, stated among other things, "'I will be returning to P.A. 3-24-02 is my Max out date and then my detainer come up. . . .'" *Id.* Apparently, this was some

cryptic reference to the fact that he would be moving to Pennsylvania.

Mr. Poole sent another letter to the District Court, which was received on April 1, 2002, which provided in its entirety:

> Samuel T. Poole BN5599
> Box 244
> Graterford Pa 19426-0244
>
> To: Clerk
>
> It will take me a couple of weeks to get a pen or to make a phone call or to get some paper this is the only way I can contact you with a pencil
>
> Thank you
>
> Samuel T. Poole

Poole, 368 F.3d at 265. Although the letter contained Mr. Poole's new address, he failed to advise the clerk of his transfer to the facility in Pennsylvania or that he had a new address.

On April 24, 2002, the Postal Service returned to the District Court the order mailed to Mr. Poole's Delaware address, as undeliverable. *Poole*, 368 F.3d at 265. In response, the court clerk faxed a request to the Delaware Department of Corrections seeking Mr. Poole's new address, which the clerk received on April 29, 2002. *Id.* The clerk then mailed a second copy of the court's order to Mr. Poole at his address in Pennsylvania. Mr. Poole received this second copy on May 6, 2002, and mailed his notice of

appeal to the District Court on May 9, 2002 – 44 days after entry of the Court's order dismissing the case.[1]

The Third Circuit's Decision

The Third Circuit dismissed Mr. Poole's appeal on May 13, 2004, after determining that it was without jurisdiction to entertain the appeal because Mr. Poole failed to file a notice of appeal within 30 days of the entry of judgment, the deadline mandated by Appellate Rule 4(a)(1)(A). *Poole*, 368 F.3d at 266-67. The Third Circuit correctly held that a timely notice of appeal is a "mandatory jurisdictional prerequisite," and that Mr. Poole's untimely notice of appeal prevented it from considering the merits of his appeal. *Id.* at 264 (citing *United States* v. *Robinson*, 361 U.S. 220, 224, 80 S. Ct. 282, 4 L.Ed.2d 259 (1960)).

The Third Circuit rejected Mr. Poole's argument that the rule stated in the Third Circuit's decision in *United States* v. *Grana*, 864 F.2d 312 (3d Cir. 1989), should apply to this case. In *Grana*, the Third Circuit held that, "'in computing the timeliness of filings which are jurisdictional in nature, any delay by prison officials in transmitting notice of a final order or judgment to an incarcerated *pro se* litigant, should be excluded from the computation.'" *Id.* at 313. Mr. Poole complained that the time delay, which he attributed to the clerk's office, should be subtracted from his time to appeal. *Poole*, 368 F.3d at 265. The Third Circuit, however, declined to extend the approach of *Grana* (a criminal case) to Mr. Poole's case (a civil action) because

[1] Based on this Court's opinion in *Houston* v. *Lack*, 487 U.S. 266, 108 S. Ct. 2379, 101 L.Ed.2d 245 (1988), Mr. Poole's notice of appeal was deemed filed when he delivered it to prison authorities to mail.

Federal Rule of Civil Procedure 77(d) and Federal Rule of Appellate Procedure (hereinafter "Appellate Rule") 4(a) prevented the application of *Grana* to a civil action. *Id.* at 265-66. Federal Rule of Civil Procedure 77(d) provides that lack of notice of entry of an order by the clerk does not affect the time to appeal or authorize the court to relieve a party for failure to timely appeal, except as permitted in Appellate Rule 4(a). Thus, Mr. Poole's attempt to blame the clerk's office for his untimely appeal did not help him because Federal Rule of Civil Procedure 77(d) expressly provides that lack of notice is not grounds to extend the time to appeal. Mr. Poole's only chance to save his appeal from dismissal was if he satisfied the requirements of Appellate Rule 4(a)(6).

The Third Circuit analyzed whether Mr. Poole could obtain relief under Appellate Rule 4(a)(6). Based on the language of the rule, the Third Circuit found that a litigant must file a motion to invoke the relief provided by the rule. Mr. Poole did not, however, file such a motion. Rather, he "simply filed a notice of appeal." *Poole*, 368 F.3d at 267. Therefore, unless the notice of appeal could be construed as a motion, Mr. Poole's appeal would be dismissed as being untimely.

The Third Circuit had not previously addressed this issue under Appellate Rule 4(a)(6), however, it had a previous occasion to address the issue under Appellate Rule 4(a)(5). In *Herman* v. *Guardian Life Ins. Co. of America,* 762 F.2d 288 (3d Cir. 1985), the Third Circuit addressed the question of whether a late notice of appeal could be construed as a motion under Appellate Rule 4(a)(5). The *Herman* court noted that prior to the 1979 amendment to Appellate Rule 4(a)(5), the court was generally willing to allow a late notice of appeal to be the

substantial equivalent of a motion to extend time based on excusable neglect. *Herman*, 762 F.2d at 289. The amended rule, however, expressly provides that an extension of time may be granted "'upon motion'" thereby precluding the prior practice. *Id.* The *Herman* court also noted that the Committee Notes on the 1979 amendment state that the amendment would make clear "'that a *motion* to extend the time must be filed no later than 30 days after the expiration of the original appeal time.'" *Id.* (emphasis added) Accordingly, the Third Circuit held in *Herman* that relief may not be granted under Appellate Rule 4(a)(5) unless a motion is filed. *Id.* The Third Circuit noted in its May 13 decision in *Poole*, that every other circuit court of appeals which addressed this question under Appellate Rule 4(a)(5) has reached the same conclusion. *Poole*, 368 F.3d at 267.

In *Poole*, the Third Circuit compared Appellate Rule 4(a)(5) with 4(a)(6). The Third Circuit noted that the language of the rules were not materially different and the Committee Notes were very similar as well. Accordingly, the Third Circuit applied the reasoning of *Herman* to Appellate Rule 4(a)(6) and held that the rule requires the filing of a motion. While the Third Circuit recognized that "'no particular form of words is necessary to render a filing a 'motion', a simple notice of appeal'", which was what Mr. Poole filed, "does not suffice." *Poole*, 368 F.3d at 268 (citation omitted).

The Third Circuit recognized that its holding is in conflict with the Eleventh Circuit's decision in *Sanders* v. *United States*, 113 F.3d 184 (11th Cir. 1997), where the court allowed an untimely notice of appeal to be construed as a motion under Appellate Rule 4(a)(6). *Poole*, 368 F.3d at 268. The Third Circuit, however, found the Eleventh

Circuit's grounds for ignoring the language of the rule and departing from the reasoning applied to Appellate Rule 4(a)(5), unpersuasive. *Id.* at 269. Accordingly, Mr. Poole's appeal was dismissed as untimely.

ARGUMENT

I. ONLY THE THIRD AND ELEVENTH CIRCUITS HAVE EXPRESSLY ADDRESSED THE ISSUE OF INTERPRETING APPELLATE RULE 4(a)(5) AND 4(a)(6) CONSISTENTLY AND THUS, THE EXTENT OF THE CONFLICT IS OVERSTATED BY MR. POOLE.

The conflict on the issue presented in this case is limited to the Third Circuit's decision in *Poole* v. *Family Court of New Castle County*, 368 F.3d 263 (3d Cir. 2004) and the Eleventh Circuit's opinion in *Sanders* v. *United States of America*, 113 F.3d 184 (11th Cir. 1997). When thoroughly vetted, the actual split is far less pervasive, and far less established, than the split described by Mr. Poole. In fact, a review of the decisions pointed to by Mr. Poole reveals that no other circuit court has passed on the specific question presented, namely whether Appellate Rule 4(a)(5) and 4(a)(6) must be interpreted consistently regarding whether a motion must be filed to obtain relief under the rule.[2]

[2] As discussed below, in a recent order, the D.C. Circuit appears to require the filing of a motion under Appellate Rule 4(a)(5) and 4(a)(6). *See Global Index, Inc.* v. *Mkapa*, No. 04-7016, 2004 WL 1368856 (D.C. Cir. Jun. 17, 2004).

In *Poole*, the Third Circuit ruled that it could not construe an untimely notice of appeal as a motion under Appellate Rule 4(a)(6). The Third Circuit reached its conclusion after carefully comparing similar language contained in Appellate Rule 4(a)(5) and 4(a)(6) and their corresponding Committee Notes. The Court reasoned that the amendments to Appellate Rule 4(a)(5) and 4(a)(6) prevented the Court from allowing a notice of appeal to be construed as a motion.

In *Sanders*, the would-be appellant, Mr. Sanders, attempted to appeal by filing an untimely notice of appeal of a judgment entered against him on June 19, 1996. *Sanders*, 113 F.3d at 185-186. Mr. Sander's notice of appeal was deemed filed on August 28, 1996, which was nearly ten days after the deadline to file an appeal. *Id.* The Eleventh Circuit, however, construed the notice of appeal as a motion under Rule 4(a)(6). In determining that the notice of appeal should be construed as a motion, the court referenced its prior decisions refusing to construe an untimely notice of appeal as a motion under Rule 4(a)(5), but held that a different approach was appropriate under Rule 4(a)(6). Thus, the Eleventh Circuit held that an untimely notice of appeal can be construed as a motion under Appellate Rule 4(a)(6). *Id.* at 187.

Mr. Poole attempts to paint a picture of an extensive split among the circuits. However, the Third and Eleventh Circuit decisions is the entire extent of the split, as no other circuit courts have directly faced the issue of whether the language of Appellate Rule 4(a)(6), should be construed consistently with Appellate Rule 4(a)(5), which requires the filing of a motion to invoke its provisions. The cases cited by Mr. Poole from other circuits do not address the issue.

Mr. Poole places considerable emphasis on case law in the Tenth Circuit, namely *Ogden* v. *San Juan County*, 32 F.3d 452 (10th Cir. 1994). *See* Petition at 9. In that decision, however, the Tenth Circuit was actually reviewing a district court's decision in which it had refused to reopen the time to appeal. In laying out the procedural background of the case, the Tenth Circuit simply noted its prior order which remanded the case to the district court with instructions to construe the untimely notice of appeal as a motion under Appellate Rule 4(a)(6). *Ogden*, 32 F.3d at 454. The Tenth Circuits's prior order contained no discussion of the requirements of Appellate Rule 4(a)(6), let alone an analysis of whether such an instruction was consistent with the rule. Similarly, in *United States* v. *Dodds*, 42 F.3d 1407, 1994 WL 673056 (10th Cir. 1994) which Mr. Poole points to despite its non-precedential designation, the court's brief order contains no analysis of the requirements of Appellate Rule 4(a)(6). Furthermore, the order in *United States* v. *Muldrow*, No. 99-3357 (10th Cir. Apr. 13, 2000), contains no analysis whatsoever. Accordingly, the Tenth Circuit has not considered whether Appellate Rule 4(a)(5) and 4(a)(6) should be read consistently.

A review of the remainder of the cases cited by Mr. Poole demonstrates that none have analyzed the requirements of Appellate Rule 4(a)(6) or whether allowing a notice of appeal to be construed as a motion under that subsection, is appropriate given the consistent reading of Appellate Rule 4(a)(5) by the circuit courts.[3] *See, e.g.*,

[3] *See, Poole*, 368 F.2d at 267 ("Every other court of appeals to consider the question [under Appellate Rule 4(a)(5)] has reached the same conclusion.")

Abreu v. *United States*, No. 97-686L, 1999 WL 143098 (D.R.I. Feb. 4, 1999) (the magistrate's report stated "*Apparently*, in remanding this matter to the district court, the First Circuit intends that the *pro se* petitioner's notice of appeal be considered as a motion made pursuant to Fed. R. App. P. 4(a)(6)." (emphasis added); *Martinez* v. *Scully*, No. 91 Civ. 5774, 1995 WL 326479 (S.D.N.Y. May 31, 1995) (district court noting Second Circuit's direction to treat notice of appeal as a motion, without discussion of issue); *Powless* v. *Gross*, No. 95-CV-1575, 1996 WL 421195 (N.D.N.Y. July 18, 1996) (same); *United States* v. *Akinkoye*, 16 Fed. Appx. 179 (4th Cir. 2001) (per curiam opinion summarily remanding case to district court to construe an untimely notice of appeal as a Rule 4(a)(6) motion without analysis of the issue); *United States* v. *Gray*, 98 Fed. Appx. 239 (4th Cir. 2004) (per curiam opinion remanding case, without discussion of requirements of the rule, ordering that the late notice of appeal be construed as a motion under Appellate Rule 4(a)(6)).

Two of the cases cited by Mr. Poole do not stand for the proposition that a notice of appeal should be construed as a motion, as Mr. Poole suggests. In *United States* v. *Blakely*, 97 Fed. Appx. 453 (4th Cir. 2004), in a per curiam opinion summarily remanding case to district court, the Fourth Circuit instructed the lower court to construe the motion to extend time, which was filed along with a notice of appeal, as a motion under Rule 4(a)(6), merely based on the timing of the filing of the motion. In *Buckley* v. *Freund*, 22 Fed. Appx. 185 (4th Cir. 2001), in a per curiam opinion, although the appellant failed to file a notice of appeal, he timely filed a motion for extension of time to file an appeal, which the court directed the district court to treat as a Rule 4(a)(5) or 4(a)(6) motion.

Finally, Mr. Poole cites *United States* v. *Feuver*, 236 F.3d 725 (D.C. Cir. 2001) for the proposition that the D.C. Circuit appears willing to accept a notice of appeal as a motion. However, the D.C. Circuit in a per curiam order in *Global Index, Inc.* v. *Mkapa*, No. 04-7016, 2004 WL 1368856 (D.C. Cir. June 17, 2004), stated that Fed. R. App. P. 4(a)(6) requires the filing of a motion, not just a notice of appeal.

II. THE THIRD CIRCUIT CORRECTLY RULED THAT APPELLATE RULE 4(a)(6) REQUIRES THE FILING OF A MOTION TO OBTAIN RELIEF UNDER THE RULE.

The Third Circuit correctly ruled that Appellate Rule 4(a)(6) requires the filing of a motion and that a bare notice of appeal will not suffice to obtain relief under the rule. *Poole*, 368 F.3d at 268. The Third Circuit began its analysis with the rule itself, which provides:

> The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied: (A) *the motion is filed* within 180 days after the judgment or order is entered or within 7 days after the moving party receives notice of the entry, whichever is earlier; (B) the court finds that the moving party was entitled to notice of the entry of judgment or order sought to be appealed but did not receive the notice from the district court or any party within 21 days after entry; and (C) the court finds that no party will be prejudiced.

Poole, 368 F.3d at 266; Fed. R. App. P. 4(a)(6) (emphasis added). Thus, the language of the rule leaves no room for

argument – a party must file a motion to seek relief under the rule. The Third Circuit so held, and then considered whether it could construe an untimely *pro se* notice of appeal as a motion to reopen. *Poole*, 368 F.3d at 267.

The Court began this analysis with its decision in *Herman* v. *Guardian Life Ins. Co. of America*, 762 F.2d 288 (3d Cir. 1985), in which it was faced with the question of whether a notice of appeal could be construed as a motion under Appellate Rule 4(a)(5). *Poole*, 368 F.3d at 267. In *Herman*, the court noted that the 1979 amendment to the rule precluded the Court's prior practice of allowing a late notice of appeal to be the substantial equivalent of a motion to extend time for excusable neglect. *Id.* This ruling was based on the express language of the rule, which states that the time to file an appeal may be extended "'upon motion'". *Id.* Thus, the filing of a motion is expressly required by the rule. *Id.* The *Herman* court also looked to the Committee Notes to the 1979 amendment to Appellate Rule 4(a)(5), which provide "'[t]he proposed amendment would make it clear that a *motion* to extend the time must first be filed no later than 30 days after the expiration of the original appeal time.'" *Id.* (emphasis added). Thus, based on the language of the rule and the Committee Notes, the *Herman* court held that an extension of time under 4(a)(5) could not be granted unless a motion was filed. *Id.* Every circuit court of appeals which has addressed this issue has reached the same conclusion. *Id.*

The Third Circuit in *Poole* applied the reasoning of *Herman* to Appellate Rule 4(a)(6) because the language of the two provisions are "not materially distinguishable." *Poole*, 368 F.3d at 267. Similarly, "the Committee Notes for the two provisions are hard to distinguish in the respect

relevant here." *Id. Compare*, 1979 Committee Notes for Appellate Rule 4(a)(5) (" . . . *a motion to extend the time must be filed* no later than . . .) *with* 1991 Committee Notes for Rule 4(a)(6) (*"Reopening may be ordered only upon a motion* filed within 180 days . . .). FED. R. APP. P. 4, Advisory Committee Notes; *Poole*, 368 F.3d at 268-269 (emphasis added). Therefore, the Third Circuit held that Appellate Rule 4(a)(6) must be read consistently with Rule 4(a)(5), which requires the filing of a motion. *Poole*, 368 F.3d at 268-269.

The Third Circuit's interpretation of Rule 4(a)(6) is bolstered by the language of Rule 4(b), the criminal counterpart of Rule 4(a). In fact, Rule 4(b) plainly demands the more lenient treatment sought in this case by Mr. Poole, but only applies this leniency to criminal appeals. Rule 4(b)(4) allows a court to extend the time for an appeal "with or without motion and notice." It would have been a simple matter indeed to insert this very clause into Rule 4(a)(6) if the rule's drafters intended the interpretation advanced by Mr. Poole.

The Third Circuit recognized that its decision is at odds with the Eleventh Circuit's decision in *Sanders*, but found the reasoning of *Sanders* unpersuasive. The Third Circuit rejected the Eleventh Circuit's apparent perception that a party that moves under Rule 4(a)(5) is less blameless than a party that moves under Rule 4(a)(6). *Poole*, 368 F.3d at 268. The Third Circuit then gave examples of where a litigant would be blameless in the context of an application under Rule 4(a)(5) and where a litigant is not blameless in the context of an application under Rule 4(a)(6). Thus, there is no logical basis for the Eleventh Circuit's belief that one class of applicants should be treated more favorably than the other.

Next, the Third Circuit rejected the notion that the duty to construe *pro se* pleadings liberally is a basis for "taking a fundamentally different approach" in interpreting Appellate Rule 4(a)(5) and 4(a)(6). *Poole*, 368 F.3d at 268-69. The Eleventh Circuit gave no reason for taking such a fundamentally different approach, nor is there any in the rule.

Finally, the Third Circuit rejected the Eleventh Circuit's unfounded concern that without applying its interpretation of Appellate Rule 4(a)(6), prison officials could prevent an inmate from taking an appeal by ensuring that they do not receive adverse decisions until after the time to appeal has expired. *Poole*, 368 F.3d at 269. The Third Circuit stated that the Eleventh Circuit's hypothetical situation is unlikely to arise and if it did, the Court could use its tools to craft an appropriate remedy. *Id*. The Third Circuit correctly ruled that the interpretation of the rule should not be guided by an "extreme hypothetical." *Id*. Thus, the Third Circuit properly rejected the Eleventh Circuit's grounds for not applying Rule 4(a)(6) consistently with Rule 4(a)(5).

Mr. Poole argues that the Third Circuit is mistaken in viewing Rule 4(a)(5) and 4(a)(6) in the same manner. His arguments, however, have no basis in the rule and therefore, are without merit.

First, Mr. Poole claims that Appellate Rule 4(a)(5) and 4(a)(6) should be read differently because, he perceives Appellate Rule 4(a)(5) to be more general and thus, a request under that rule would require more detail and Appellate Rule 4(a)(6) is specific and therefore more straightforward. Petition at 13. As such, Mr. Poole goes on to state, a request for relief under Appellate Rule 4(a)(6)

can easily be included in a notice of appeal. *Id.* However, the issue here is not whether the grounds for a motion under either section can be included in a notice of appeal. The issue is whether or not a motion is required. Appellate Rule 4(a)(5) and 4(a)(6), which are "not materially different," both expressly require the filing of a motion. Not only does Mr. Poole's argument make no sense based on the express language of the rule, it makes no sense as a practical matter. A litigant can just as easily add language to a notice of appeal which seeks relief under Appellate Rule 4(a)(5). For example, the litigant could simply state that a fire burned down his building preventing him from timely filing an appeal. *See Pioneer Inv. Servs. Co.* v. *Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 387-88, 113 S. Ct. 1489, 123 L.Ed.2d 74 (1993) ("an act of God or unforseeable human intervention" may constitute excusable neglect.)

Mr. Poole next argues that the Third Circuits' interpretation of Appellate Rule 4(a)(6) defeats the purpose of the rule, which is to relieve a party of the rigors of Appellate Rule 4(a)(5). Petition at 14. Therefore, Mr. Poole asserts that Appellate Rule 4(a)(6) requires less formality. *Id.* Again, there is no basis for Mr. Poole's distinction given the language of the rule. While there may be different standards that apply on the merits of a motion under the two provisions, the standard for invoking the provisions is the same. A motion is expressly required. Put simply, although Mr. Poole can use semantic tools to discern a less "formal" intent from otherwise clear language in Appellate Rule 4(a)(6), the language of the Rule itself rejects the position taken by Mr. Poole.

Realizing that there is no basis for a distinction in interpretation of the two provisions, Mr. Poole argues that "appropriately worded *pro se* notices of appeal" should be

construed as a motion under both Rule 4(a)(5) and 4(a)(6). Petition at 14. Mr. Poole bases his argument on the proposition that *pro se* litigant's pleadings should be construed liberally. *Id.* Not only is such a result contrary to the consistent interpretation of Appellate Rule 4(a)(5), *see, e.g.*, *Cohen* v. *Empire Blue Cross & Blue Shield*, 142 F.3d 116, 118 n.1 (2d Cir. 1998) (refusing to treat a notice of appeal as a motion for extension of time under Appellate Rule 4(a)(5)); *Wilder* v. *Chairman of the Cent. Classification Bd.*, 926 F.2d 367, 371-72 (4th Cir. 1991) (same); *Senjuro* v. *Murray*, 943 F.2d 36, 37 (10th Cir. 1991) (same); *United States* v. *O'Leary*, 788 F.2d 1238, 1239-40 (7th Cir. 1986) (same); *Parker* v. *Strickland*, 728 F.2d 1406 (11th Cir. 1984) (same), it would make the plain language of the rule meaningless. Mr. Poole would have the court read out of the rule the requirement of filing a motion. Moreover, construing a notice of appeal as a motion for an extension of time would create confusion. As explained by the United States District Court for the Southern District of New York:

> As a matter of policy, it would be unwise to construe [notices of appeal] as motions. Doing so would open the door to a floodgate of litigation over whether ministerial papers that are routinely filed in the Clerk's office – documents that are ordinarily of no concern to judges, and that may not even be forwarded to chambers – should be parsed to see if circumstances warrant transforming them into sub silentio applications for relief from some procedural defect that cannot be cured. Both this Court and the Court of Appeals have recognized that *pro se* litigants must comply with the Federal Rules of Civil and Appellate Procedure, as well as with various technical requirements, such as filing deadlines and statutes

> of limitations, with which they ordinary might not be familiar. While *pro se* litigants are entitled to some leeway in pleading, stretching the concept of a "motion" to encompass papers that are manifestly not motions in order to redress perceived inequities is more leeway than this Court is prepared to give.

Knickerbocker v. *Artuz*, 198 F. Supp. 2d 415, 418 (S.D.N.Y. 2002). This important distinction lead the Third Circuit to observe "[w]hile 'no particular form of words is necessary to render a filing a "motion,"' . . . a simple notice of appeal does not suffice." *Poole*, 368 F.3d at 268 (citing *Campos* v. *LeFevre*, 825 F.2d 671, 676 (2d Cir. 1987)). For the same reasons, this is not, as Mr. Poole suggests, form over substance.

Finally, Mr. Poole argues that if the Third Circuit's approach is followed, prison officials would be allowed to block prisoners' access to the courts by ensuring that they do not receive notice of a judgment until after the time provided in Appellate Rule 4(a)(1). Petition at 15. First, the Third Circuit ruled that to obtain relief under Appellate Rule 4(a)(6), a motion must be filed and that a bare notice of appeal is not sufficient. *Poole*, 368 F.3d at 268. Had Mr. Poole simply filed a motion with his notice of appeal, he would not be in the situation he finds himself.[4] Thus, even if prison officials delayed the delivery of notice of a judgment, the prisoner would still have the ability to

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[4] Had Mr. Poole filed a motion under Appellate Rule 4(a)(6), the lower court would have considered the merits of his motion. Mr. Nails asserts that such a motion would have been denied because the reason Mr. Poole was late in filing his notice of appeal was due to his own failure to advise the court of his change of address. *See Poole*, 368 F.3d at 266 n.4.

obtain relief available to him under Appellate Rule 4(a)(6) if he simply files a motion. Second, the Third Circuit's decision does not allow prison officials to block prisoner access to the courts. If prison officials desire to ensure that a prisoner does not receive a pleading in order to block his access to the court, all the officials would have to do is wait until after the 180 days provided in Rule 4(a)(6), has expired. The Third Circuit's ruling has no impact on such behavior. Third, this situation is not at all similar to that in *Houston* v. *Lack*, 487 U.S. 266, 108 S. Ct. 2379, 101 L.Ed.2d 245 (1988), as Mr. Poole suggests. The Court *Houston* held that the time of filing of a prisoner's notice of appeal is when the pleading is deposited with the prison authorities for delivery to court. *Houston*, 487 U.S. at 269-70. The Court based its decision on two grounds. First, unlike here, the rules[5] are not dispositive on this point. *Id.* at 273. Second, a *pro se* prisoner has no choice but to use the prison mailing system, over which he has no control. *Id.* The mailbox rule adopted by the Court makes the determination as to when the pleading was filed straightforward, rather than an uncertain one. *Id.* Here, the rules expressly provide that a motion is required. Moreover, the delay in Mr. Poole receiving notice of the court's order, was not out of his control. Finally, as discussed above, if the approach suggested by Mr. Poole is adopted, confusion and a flood of litigation would ensue.

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[5] The Court in *Houston* turned to Appellate Rules 3(a) and 4(a)(1) for guidance.

III. THE DECISION BELOW INVOLVES NEITHER AN IMPORTANT ISSUE NOR A RECURRING QUESTION.

Although the issues presented in this matter certainly may be important to litigants who disregard appellate jurisdictional requirements and decline the opportunity to seek the relief available to them under the ruling, but otherwise they do not have great practical importance or significant national implications for all federal appellants. *See* Supreme Court Rule 10(c). Rather, the issues presented will impact only a minuscule population of federal court litigants. This fact can be made no more apparent than by pointing to the 7 year gap between published circuit court opinions thoroughly discussing the rule in this context. There is, accordingly, no basis for this Court's discretionary review of this case based on the grounds set forth in Rule 10.

To the extent Mr. Poole argues that the result sanctioned by the Third Circuit is "unjust," this Court has recognized that appellate filing deadlines can produce harsh results, but that enforcement of deadlines is nonetheless required. *See United States* v. *Locke*, 471 U.S. 84, 101, 105 S. Ct. 1785, 85 L.Ed.2d 64 (1985). Moreover, Mr. Poole is not being arbitrarily "denied access" to the courts of appeal. He simply failed to take advantage of the opportunity to seek review in the Third Circuit – fault that he cannot place with any individual or entity except himself.

CONCLUSION

For the forgoing reasons, Mr. Nails respectfully requests that the Court refuse to exercise its discretionary authority under Supreme Court Rule 10 and deny Mr. Poole's application for a Writ of Certiorari.

Respectfully submitted,

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